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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 457

BROOKLYN WATERFRONT TERMINAL CORPORATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Brooklyn Waterfront Terminal Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on June 5, 1950.

Opinions Below

The opinion of the Court of Claims (R. 56-70) and the dissenting opinion of Judge Madden (R. 70-72) are reported in 90 F. Supp. 943.

Jurisdiction

The judgment of the Court of Claims was entered on June 5, 1950 (R. 72). A motion for a new trial was seasonably filed by the plaintiff in the Court of Claims on June 26, 1950, and overruled by order entered on October 2, 1950

(R. 72). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255(1).

Question Presented

The United States as lessee failed to maintain petitioner's property in good repair and tenantable condition as required by a covenant in the lease. The question presented is whether the court below erred as a matter of law in limiting the liability of the United States for its default to the amount necessary to put the property in good repair for the purposes of the United States under the lease, as distinguished from good repair and tenantable condition for the purposes required in the conduct of petitioner's business.

Statement

Property owned by petitioner and used by it for commercial terminal and storage operations involving bagged and perishable foodstuffs such as sugar, coffee and cocoa (R. 60) was leased by it to the United States on January 5, 1943 (R. 56). Following certain modifications, extensions, and renewals not now relevant, the lease was duly terminated by the United States on December 31, 1947 (R. 56). Under the terms of the lease the property was leased "for naval purposes" (R. 56), and throughout the period involved in this suit it was used by the United States exclusively for the storage of naval supplies under jurisdiction of the Supply Department of the New York Naval Shipyard, Brooklyn, N. Y. (R. 58).

The lease was executed on a printed form identified as "United States Standard Form No. 2" (R. 43-44). This form contains a standard provision (paragraph 9) placing upon the *lessor* the responsibility for maintaining the leased property "in good repair and tenantable condition . . . except in case of damage arising from the act or the

negligence of the Government's agents or employees" (R. 44). In this case, however, paragraph 9 was deleted by mutual consent before execution, and a new paragraph 12 inserted, reading as follows:

> The Government shall maintain the said premises, buildings, equipment, piers, bulkheads, slips and appurtenances in good repair and tenantable condition during the continuance of this lease. (R. 44-45.)[1]

During the course of the lease petitioner repeatedly complained of the failure of the United States to comply with its obligation of maintenance under paragraph 12 (R. 59), and at the termination of occupancy instituted this action to recover damages from the United States by reason of its default. Following the trial of the issues the court below found as a fact that the United States had subjected the property to heavy use, and that at the termination of the lease it was not in good and tenantable condition as required thereby (R. 60). The court found that just compensation to petitioner for repair of the property to good and tenantable condition for the purposes required in the conduct of petitioner's business would be the sum of $172,321.62 (R. 55, 60).[2] However, the court also found that the

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[1] The lease as executed retained the standard paragraph 8, permitting the United States "to make alterations, attach fixtures, and erect additions, structures, or signs, in or upon the premises," and providing further that such "fixtures, additions, or structures . . . shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this lease, and the Government, if required by the Lessor, shall, before the expiration of this lease or renewal thereof, restore the premises to the same condition as that existing at the time of entering upon the same under this lease. . . . ." (R. 44). No claim under this paragraph is presented by this petition for a writ (R. 59, 62).

[2] At the trial petitioner adduced evidence tending to show that the sum necessary for this purpose would be $250,379.43 (R. 54). The court below accepted the basis of petitioner's computations (R. 54), but found certain of the items not to be established by the weight of the evidence (R. 55). The propriety of the disallowance of these items is not sought to be raised by this petition for a writ.

sum required to put the premises in good repair and tenantable condition for the purposes for which leased, namely, naval purposes, would require an expenditure of only $33,319 (R. 53, 60). Regarding the selection as between these two bases of compensation as "the principal issue of law" (R. 60), the court (Madden, J., dissenting) adopted the latter, and accordingly awarded petitioner the sum of $33,319 (R. 70).[3]

Reasons for Granting the Writ

1. In reaching its conclusion the court below started from the premise that "the applicable law is federal, rather than State, although in absence of federal cases in point the courts may properly turn for guidance to the general law of landlord and tenant" (R. 64). In this the court was in accord with *Girard Trust Co.* v. *United States,* 149 F. 2d 872, 874, 161 F. 2d 159, 161 (C.A. 3rd).

This Court has in recent years given careful consideration in a series of cases to the question of when federal as contrasted with state law should be regarded as applicable in disputes between the United States and private citizens, and to the question how far state court decisions should be consulted and followed in the absence of federal precedents. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *United States* v. *Allegheny County,* 322 U. S. 174; *National Metropolitan Bank* v. *United States,* 323 U. S. 454. As yet, however, the Court has not so far as we are aware spoken on the matter in the specific field of government leases of real estate, and we submit that the question is not necessarily concluded by decisions dealing with other types of government obligations. It is by no means clear that the same

[3] The dissenting judge, while accepting petitioner's view of the law, questioned the complete validity of petitioner's cost estimates, and voted for an award of $80,000, a figure not reflected in the testimony of either side (R. 72).

considerations which call for uniformity in the interpretation of government commercial or procurement contracts generally are present in the field of government real estate leases; for the ownership and leasing of real estate present peculiarly local problems which throughout our jurisprudence are traditionally dealt with on principles locally evolved.[4] The effect of the decision below is to deprive a New York landlord, who has contracted in New York with respect to New York real estate, of the rights to which he would have been entitled had he been contracting with a private individual or concern rather than with the Government of the United States. Whether the federal courts should be permitted to create a favored status for the United States when it chooses to bargain at arm's length for the use of privately owned real estate presents, we submit, an important question of federal law which has not been, but should be, settled by this Court.

We do not have access to any statistics showing the extent to which the United States has adopted the practice of deviating from its standard form lease in the respects involved here and in *Girard Trust Co.* v. *United States, supra;* but we take the liberty of suggesting that in the currently developing war economy, with its concomitant need for secrecy in Government operations, the United States is likely to increase its use of lease covenants designed, as here, to keep the landlord off the premises during their Government use, —especially if the decision below is allowed to stand. Landlords who will be asked to enter into such leases should, we submit, be given the advantage of an authoritative determination by this Court as to the nature of their rights and remedies.

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[4] The local nature of the problems is recognized in the commonly known practice by which real estate leases are customarily negotiated for the United States by attorneys skilled in the real estate law and customs of the locality.

2. The decision below conflicts, in principle at least, with the decision of the Court of Appeals for the Third Circuit in *Girard Trust Co.* v. *United States,* 161 F. 2d 159, *supra.* There the court, on the authority of the New York and other precedents on which petitioner relied below, explicitly held that the obligation of the United States to repair and maintain applied to a defect shown to have existed at the time the property was leased. This conclusion was based upon the doctrine, well established in British and New York law and not apparently deviated from elsewhere, that a landlord seeking damages for failure of maintenance under such a covenant is under no necessity to establish original condition as a prerequisite of recovery.[5] In the instant case the court below recognized that on the basis of a similar holding here the petitioner would be entitled to prevail, but rejected the doctrine as "extreme". "That such may have been the effect of the judgment of courts in some jurisdictions does not warrant us in making the same mistake" (R. 66).

We may note here that there may be some logical inconsistency between the holding of the court below discussed in the foregoing paragraph, and its statement earlier in the opinion (R. 60) that "the principal issue of law" was whether the property should have been maintained in condition for petitioner's purposes or for those of the United States. The latter issue, as stated by the court, would appear to dispense with any question of whether establishment of original condition was necessary. However, even on the latter issue the decision would appear equally clearly to

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[5] The obligation of the tenant is expressed in *Lehmaier* v. *Jones,* 100 App. Div. (N. Y.) 495, 91 N. Y. Supp. 687, as being "not only to keep the premises in as good repair as when he enters, but to put, keep and leave in good repair, having due regard to the age and class of the buildings." The doctrine stems from the leading English case of *Payne* v. *Haine,* 16 Meeson & Welsby 541.

conflict with the opinion in *Girard Trust*. Though the point was not expressly discussed, it appeared that the repairs in *Girard Trust* were necessary for the purposes of the landlord, since the landlord had been required to make them at the insistence of the local fire insurance underwriters rating bureau; and it was equally clear that they were not necessary for purposes of the United States, for the United States had declined to make them on demand, and contended in its brief on appeal that in so far as they involved tenantability the question whether they needed to be made was a matter of concern only to it, and not to the landlord.[6] The United States was nevertheless held liable.

It is true that the court below sought to distinguish the *Girard Trust* case on its facts, but we believe the purported distinction ineffective to avoid the conflict. Moreover, the purported distinction is not persuasive on its face. No reason is assigned by the court below for its conclusion that a covenant to "maintain, repair, operate and service the building" is so much more "absolute" than one to "maintain the said premises in good repair and tenantable condition" as to require a different construction (R. 67). Some indefinite weight is put by the court below upon the fact that our lease retained the standard restoration clause of paragraph 8 (see note 1, *supra*) whereas that section had been stricken in the *Girard Trust* lease. However, it is plain that as drafted in the printed form paragraph 8 could have had no bearing upon the scope of the Government's duty to repair, since under the standard form of lease the Government had no such duty; and the meaning of the language used cannot have been altered by the parties'

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[6] "In so far as the defects affected the safety of the persons occupying the building, the matter was not one of concern for the landlord." Gov't Brief, p. 15.

decision to change the standard paragraph 9.[7] It is equally plain that the absence of such a paragraph in the *Girard Trust* case was not regarded by the parties or the court there as of any significance.

We respectfully submit that the purported factual distinction is outweighed by the express concession of the could below that the New York authorities followed in *the Girard Trust* case would, if sound, be likewise controlling here (R. 66). The court below, we believe, merely resorted to a device to avoid the appearance of conflict with a circuit court decision which it was unwilling to follow.

3. Seeking federal precedents other than the *Girard Trust* case, the court below applied as controlling authority the decision of this Court in *United States* v. *Bostwick,* 94 U. S. 53, and the line of its own decisions stemming from that case (R. 66, 67-69). The decision in the *Bostwick* case, as the court below recognized, dealt with the common law obligation of a tenant, in the absence of an express provision to the contrary, not to commit voluntary waste. Its application here amounted to, and was recognized by the court below as, holding that petitioner, in bargaining for and securing a Government covenant to maintain its property, got no more than it would have had at common law in the absence of any covenant whatsoever (R. 69). Such a decision, not only resulting in patent injustice in the case at bar but threatening to establish an unsound precedent in an important area of government contract law, constitutes a misapplication of a decision of this Court which we submit should call for review by this Court on writ of certiorari.

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[7] The plain impact of paragraph 8 was merely to require the Government, on request, to *remove* additions of the type which by the first sentence of the paragraph it was empowered to erect.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHESTER T. LANE,
Counsel for Petitioner

December 13, 1950.